

IN THE UNITED STATES PATENT AND TRADEMARK OFFICE

In re application of:)	Attorney Ref.: ZP193-05002
)	
Inventor: Richard NAVARRO, <i>et al.</i>)	Examiner: Julianna Nancy HARVEY
)	
Application No.: 10/552,094)	Group Art Unit: 3733
)	
Filed: October 4, 2005)	Confirmation No.: 4200
)	
For: Artificial Disc Prosthesis)	Date Submitted: February 26, 2010

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Commissioner for Patents
PO Box 1450
Alexandria, VA 22313-1450

**REQUEST FOR RECONSIDERATION OF PATENT TERM ADJUSTMENT (PTA)
UNDER 35 U.S.C. § 154 AND 37 C.F.R. § 1.705(b)**

Dear Sir:

The following remarks are submitted in response to the Determination of Patent Term Adjustment under 35 U.S.C. § 154(b) (the "Determination"), which was mailed with a Notice of Allowance on November 30, 2009, in the above-referenced patent Application. The Determination stated that the PTA is 218 days. The Applicants, however, contend that the PTA should be 406 days and offer an explanation for this number below. Accordingly, the Applicants seek a Reconsideration of PTA in accordance with 37 C.F.R. § 1.705(b). Accordingly, a payment, as specified in 37 C.F.R. § 1.18(a), of \$200.00 is accompanied with this response.

According to *Wyeth v. Kappos*, No. 2009-1120 (Fed. Cir. Jan. 7, 2010), the Patent Office has been incorrectly determining Patent Term Adjustments, and, in fact, the Determination for the present application was prepared prior to the issuance of the *Wyeth* decision. The Applicants contend, in light of *Wyeth*, that this Determination was made in error. Therefore, the Applicants respectfully request that a new Determination be made in accordance with the *Wyeth* decision and as outlined below.

The *Wyeth* court construed 35 U.S.C. § 154(b)(1) to be understood by a simple equation: Delays by the Patent Office missing a variety of deadlines as prescribed by 35 U.S.C. § 154(b)(1)(A) ("A Delays") + Delays by the Patent Office for not issuing a

Patent within three years of the filing days as prescribed by 35 U.S.C. § 154(b)(1)(B) ("B Delays") – The number of days due to A Delays that also overlap the B Delays

("Overlap") – The Applicants' Delays = PTA. In other words:

$$PTA = A \text{ Delays} + B \text{ Delays} - \text{Overlap} - \text{Applicants' Delay}$$

It should be noted that all delays are measured in terms of days.

The table below outlines the delays that occurred in the present application. The table below assumes that the present application will issue within the prescribed time limits.

Activity	Date	A Delays	B Delays	Overlap	Applicants' Delays
Filing Date	10/04/2005	-	-	-	-
First Action	12/04/2006	399	-	-	-
Response to First Action	04/07/2008	-	-	-	-91
Response to Second Action (RCE)	01/10/2009	-	-424	-	-90
Three-year Deadline	10/04/2008	-	612	-	-
Delay Totals		399	188	0	-181
Total Days of Patent Term Extension (sum of delays)		406			

As summarized in the above table, the only A Delays were due to the Patent Office issuing a first Action 399 days after fourteen months had passed from the initial filing of the present application.

The B Delays total 188 days. This number comes from the fact that, if the patent issues on June 8, 2010, the Patent Office will miss the three-year deadline prescribed by 35 U.S.C. § 154(b)(1)(B) by 612 days. However, the same statute limits this delay to time consumed by, inter alia, the filing of an Request for Continued Examination (RCE). Therefore, because the Applicants filed an RCE on January 10, 2009, the B delays will be reduced by 424 days. In other words, the total B Delays will be 188 total days.

None of the delays due to A Delays or B Delays overlapped. Therefore the Overlap is zero.

Finally, the Applicants delayed a total 181 days. 91 days of Applicant Delay were due to filing a Response to the first Action 91 days beyond the three-month shortened statutory period. Another 90 days were consumed because the Applicants filed a Response to the second Action 90 days after the three-month shortened statutory period. Therefore, the total Applicants' Delay is 181 days.

The total Patent Term Extension, which is reflected in the bottom line of the above table, is 406 days. Expressed in the *Wyeth* equation: 399 days (A Delay) + 188 days (B Delay) – 0 days (Overlap) – 181 days (Applicants' Delay) = 406 days.

Accordingly, the Applicants respectfully request that the PTA be adjusted to 406 days.

Respectfully submitted,

MIDDLETON REUTLINGER

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